JAMES R. BROWNING, Clerk

No. 888

In the

Supreme Court of the United States

OCTOBER TERM 1960

EX PARTE
JAMES PIERCE AND RAYMOND J. BEALL

On Petition for Writ of Certiorari
to the
Supreme Court of Texas

PETITIONERS' REPLY
TO
BRIEF FOR RESPONDENT IN OPPOSITION

L. N. D. WELLS, JR.,
1601 National Bankers
Life Bldg.,
Dallas 1, Texas.

BENJAMIN C. SIGAL,
1126 16th Street, N.W.,
Washington 6, D. C.,
Attorneys for Petitioners.

WARLICK LAW PRINTING CO., 2201 VALLEY STREET, DALLAS, TEXAS

No. 888

In the

Supreme Court of the United States

OCTOBER TERM 1960

EX PARTE
JAMES PIERCE AND RAYMOND J. BEALL

On Petition for Writ of Certiorari
to the
Supreme Court of Texas

PETITIONERS' REPLY
TO
BRIEF FOR RESPONDENT IN OPPOSITION

The artfully drawn Opposition, in its first twenty pages, while not saying so specifically, seeks to leave the impressions (1) that the picketing at issue was violent and threatening,[1] and (2) that the application merely raises disputed issues of fact.

[1]Thus the Opposition asserts (p. 2) that "the methods used by Petitioners and others in conducting the strike were calculated to and did provoke violence". Respondent's "Statement" at pp. 3-9 puts the case in a context "not only of threats of violence, but acts of violence, coupled with actual physical obstruction * * *" and asserts "a series of violent acts, threats of violence, and serious interference with free ingress and egress * * *" etc.

[2]See Opposition pp. 8-20, and the lengthy recitals of testimony there contained. Note, however, that the Opposition does not set this out in context, nor does it note qualifying or contradictory testimony by the same witness.

A.

No Violence

Respondent's attempt to put threat or violence in this case occupies substantially all of the first twenty pages of the Opposition. Actually, there is neither pleading, proof nor finding of any post-restraint threat or violence.

The original petition upon which *ex parte* restraint was issued alleged threat and violence. No evidence was ever presented in support of those allegations,[3] for the strike was settled prior to injunction hearing, and the injunction application was thus moot.[4]

The only litigated matter involved actions occurring *after* the issuance of the restraint. It will not do to transform allegations of violence which based the ex parte restraint (all alleged to have occurred *prior* to the restraining order) into violence or threat *after* its issuance.

---

[3]The Opinion of the Supreme Court of Texas (Petition, p. A-50) specifies that the only evidence before the trial judge was the "verified petition". Accordingly, the Opposition's references to criminal charges (Oppos. p. 6) are without basis. While we admit that such charges were filed, if we are to go outside the record it would appear that when the charges were tried before a jury in Smith County Court, defendant Few was acquitted and the charges against Pressley were dismissed.

Similarly, the assertions at Opposition, p. 8, that Pierce made statements at the union meeting maligning the trial judge which evidenced his contempt for the restraint cannot be sustained in the light of subsequent developments. See case No. 61-57, 114th District Court, Smith County, Texas, where Pierce was charged in a separate criminal contempt proceeding with having made such utterances. After full trial he was found "not guilty" of the criminal contempt. See judgment in the cited cause rendered May 10, 1961.

[4]The Opposition acknowledges as much, viz, Opposition, p. 8: "A hearing on Respondent's application for temporary injunction was not held as scheduled on October 24, 1960, because the strike was settled on Sunday, October 23, 1960, and Respondent's application for temporary injunction as well as Defendants' and Petitioners' Motion to Dissolve became moot."

The picketing held contemptuous occurred *after* the restraint, and is wholly devoid of threat or violence. Every witness for the prosecution so testified, and admitted that everyone who desired to enter the plant did so. S. F. 32, 44-45, 64, 73, 117.

Motion pictures of the post-restraint picketing are before the Court—Exhibit 11. These admittedly record the most gross delays, S. F. 157. We join the reiterated suggestion contained in the Opposition[5] that the Court view these pictures which show peaceful picketing at deliberate pace, and make fully clear that no threat or violence is in the case.

It just will not do to suggest that violence or threat is in this case. For the Supreme Court of Texas decided the case, not on findings of threat or violence, but *solely* upon the showing, "that the pace of Pierce and the other morning picket was so slow and deliberate as to back up some 25 or 30 automobiles approaching from Tyler and intending to enter the plant premises; that the interval between the crossing of the pickets and their return was so brief that only one automobile could pass; that highway patrolmen were forced to hold up traffic traveling in a westerly direction to permit turning of the slow moving traffic across the North lane of the highway and into the plant entrance; that 'the traffic coming from Tyler was blocked considerably'; that there was a similar slow-down of automobiles leaving

[5]Opposition, p. 9, "It is Respondent's request that this Honorable Court view these moving pictures * * *". Opposition, p. 18, "Respondent requests that the Court observe these movies at 24 frames per second, the speed at which they were taken."

the plant at the end of the work day; * * *." See Opinion p. A-54-A-55, Appendix to Petition for Certiorari.

B.

No Fact Issues

What we have said above likewise makes clear that there is no fact issue here. Undisputed facts show that the pace of the pickets was slow, that "the interval between the crossing of the pickets and their return was so brief that only one automobile could pass at a time * * *." These facts were found below and are not attacked.

Upon undisputed facts petitioners assert the right in displaying a picket sign to interpose the sign before those entering the struck plant. To inform requires the auditor's attention and, accordingly, a few seconds of his time. When such potential auditors are funnelled through a single entrance the cumulation of the time required to get the message to them results in delay. Such delay, wholly incident to peaceful picketing, is not "unlawful".

C.

Pre-emption

The Opposition really makes our case for certiorari. It asserts (p. 23) that local control of "mass picketing, violence and overt threats of violence" is not pre-empted. We agree.

But we disagree with the Opposition's attempt to equate "obstruction" resulting when only two pickets peaceably proceed at a deliberate pace across the plant entrance, with

"mass picketing, violence and overt threats". By such legerdemain "peaceful picketing" is converted into *per se* violence and overt threats—and the very right to picket is demolished. Unless this Court is to abandon the distinctions between threats, intimidation, coercion and violence, on the one hand, and peaceful picketing on the other reiterated in *Youngdahl v. Rainfair, 355 U. S. 131*, the decisions below (which treat obstruction resulting from the few seconds required to see and evaluate a picket's peaceful message similarly to obstruction resulting from threat, coercion and violence) must be examined and overturned.

If the rationale of the Opposition and the Courts below is accepted the only lawful picketing is that which either nobody sees, or as to which nobody pays any attention. Is picketing pre-empted only as long as no one is influenced by it? Heretofore the distinction between informing and intimidating has been clear. The former is pre-empted. The latter is not. When the courts below obliterate this distinction they conflict with the line of cases culminating in *Youngdahl v. Rainfair, 355 U. S. 131.*

D.

Free Speech

The Opposition argues that the "• • • factor that deprives Petitioners' picketing of its constitutional protection is the resulting unreasonable obstruction of the free ingress and egress to Respondent's plant". Oppn. p. 24.

In the quoted sentence the Opposition has exposed the fallacy in the state court decisions. While giving lip-service to

the constitutional protection of the right of peaceful picketing, actually the decisions below proceed on the theory that picketing loses protection when it is observed and acted upon. But the right of communication involves both the sender and the receiver. The public has an interest in receiving information concomitant with laborers interest in disseminating information. Concern for those legitimate interests requires rejection of the view of the Texas courts which the opposition re-asserts: that picketing is lawful only when it does not delay those who observe it.

The Opposition's assertion that *Thornhill*, *Angelos* and other picketing cases did not involve pickets who interfered with ingress or egress runs counter to both the language of those opinions and the industrial facts of life. Every picket seeks to influence those who observe him to shun the picketed premises. That is the reason for the picketing. If the right to picket is worthy of constitutional protection, such protection necessarily extends to reasonable opportunity for the public to see and act on the picket's message. A denial of such opportunity is a denial of the right to picket.

E.

Due Process

Opposition's attempt to avoid the ambiguity and vagueness of proscription against "unlawfully" obstructing by suggesting that hidden in paragraph 6 of the restraint was an unqualified proscription will not do (Oppos. p. 26). For the Supreme Court of Texas has been explicit that: "only numbered paragraphs (1), (2) and (7) of the Order are impor-

tant to our discussion inasmuch as only the acts there restrained were found in the contempt judgment to have been committed in violation of the Order". See Petition for Certiorari, Appendix, p. A 47. Action questioned as violative only of ambiguous paragraphs 1, 2 and 7 does not involve the restraint set out in paragraph 6.

F.

Alleged Mootness

The assertion of mootness is frivolous. Denial of certiorari means petitioners go to jail.*

WHEREFORE, petitioners respectfully request that writ of certiorari be issued.

Respectfully submitted,

L. N. D. WELLS, JR.,
1601 National Bankers
Life Bldg.,
Dallas 1, Texas.

BENJAMIN C. SIGAL,
1126 16th Street, N.W.,
Washington 6, D. C.,
Attorneys for Petitioners.

May 12, 1961.

*Moreover the same mootness argument was made to the State Court and ignored by it. Doubtless the State Court's failure to mention the argument was because it was fallacious both as to fact and law. The facts which Opposition asserts at Oppos. p. 28 are merely alleged by way of affidavit and are controverted by affidavit. Accordingly, they may not be taken as established. See Certified Record Item 5, Motion to Strike Certificates, etc., and appended affidavit. The Texas Supreme Court has appellate jurisdiction only. See Texas Constitution, Article 5. The facts asserted at Opposition, p. 28 were not established in either the trial court or the Supreme Court of Texas. Hence they are not established here.

Moreover, assuming *arguendo* that there was no question as to the validity of the fines; there yet remains the question as to the jurisdiction and power of the State Court to jail petitioners.